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ATTORNEY FOR APPELLANT:

JOEL M. SCHUMM
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ANTWION CARTER,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A05-0601-CR-0006
)	
STATE OF INDIANA,)	
)	
Appellee.)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 6
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0506-FB-106513

December 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant-Defendant, Antwion Carter, appeals his conviction and sentence following his plea of guilty to Battery as a Class C felony.¹ Upon appeal, Carter challenges the trial court's refusal to allow him to withdraw his guilty plea.

We affirm.

The factual basis entered at the time of the plea agreement indicated that a certain Andrew Leeks was shot on June 19, 2005 at 2915 East Michigan Street. According to Leeks, who was interviewed after he was transported to Methodist Hospital, he and a friend named Dexter Porter were working on a car in a garage at the above location when Carter arrived and inquired about a "weight bench."² Leeks and Carter argued about the "weight bench," and Carter shot Leeks in the stomach with a handgun, causing Leeks serious bodily injury. The factual basis also indicated that Carter had two previous unrelated felony convictions, one for auto theft on December 20, 2002, and another for criminal confinement on September 18, 2003.

Carter was charged on June 23, 2005 with aggravated battery as a Class B felony, unlawful possession of a firearm by a serious violent felon as a Class B felony, and carrying a handgun without a license as a Class C felony. On August 31, 2005, the State further charged Carter with being a habitual offender. On November 14, 2005, Carter entered into a plea agreement with the State whereby he agreed to plead guilty to Battery as a Class C felony and to being a habitual offender, and the State agreed to dismiss all

¹ Ind. Code § 35-42-2-1 (Burns Code Ed. Supp. 2006).

² According to the probable cause affidavit, Leeks indicated that "weight bench" refers to a scale used to weigh narcotics.

remaining counts. The parties further agreed that the State would recommend that Carter be sentenced to eight years executed in the Department of Correction. On November 14, 2005, the day scheduled for trial, Carter entered his plea, and the court accepted it. On December 7, 2005, prior to the sentencing hearing, Carter filed a Motion for Withdrawal of Guilty Plea. In that motion Carter stated that his request to withdraw his guilty plea was based upon (1) Leeks's subsequent position that he was not certain Carter was the person who had shot him;³ and (2) his entering into the plea agreement was a result of his fear of the consequences of a jury trial. The trial court denied Carter's motion. In doing so, the court supported its ruling by noting that Carter had already admitted his guilt at the guilty plea hearing, Leeks's presence in court the day of trial "had a significant amount to do with the plea," and Carter's plea was to a reduced charge. Tr. at 25. The court then sentenced Carter pursuant to the plea agreement to eight years executed at the Department of Correction. Carter filed his notice of appeal on January 5, 2006.

Upon appeal, Carter argues that the trial court erred in refusing to allow him to withdraw his guilty plea. Carter claims that withdrawal of the plea is necessary to correct a manifest injustice.

Where a defendant pleads guilty under an agreement with the State, Indiana Code § 35-35-1-4(b) (Burns Code Ed. Repl. 1998) provides the applicable standard governing requests to withdraw such pleas:

³ In preserving the record, defense counsel indicated that Leeks had also left a message for her on approximately November 14th asserting his apparent certainty that Carter was not involved in the shooting, which defense counsel noted was contrary to his subsequent "uncertainty" as recorded in the affidavit as to the identity of the shooter.

“ After entry of a plea of guilty, . . . but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty, . . . for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant’s plea. . . . The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea of guilty, . . . whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.”

Our appellate courts have interpreted this statute to require a trial court to grant such a request in limited circumstances, specifically:

“only if the defendant proves that withdrawal of the plea “is necessary to correct a manifest injustice.” The court must deny a motion to withdraw a guilty plea if the withdrawal would result in substantial prejudice to the State. Except under these polar circumstances, disposition of the petition is at the discretion of the trial court.” Turner v. State, 843 N.E.2d 937, 940 (Ind. Ct. App. 2006) (quoting Weatherford v. State, 697 N.E.2d 32, 34 (Ind. 1998) (citation omitted)), reh’g denied.

We recognize that the court must allow a defendant to withdraw a guilty plea if “necessary to correct a manifest injustice.” Brightman v. State, 758 N.E.2d 41, 44 (Ind. 2001). By contrast, the court must deny the motion if withdrawal of the plea would “substantially prejudice[]” the State. Id. In all other cases, the court may grant the defendant’s motion to withdraw the plea “for any fair and just reason,” but such is at the discretion of the court. See id.; see also Centers v. State, 501 N.E.2d 415, 419 (Ind. 1986) (stating that although as a general rule withdrawals of guilty pleas prior to sentencing should be freely allowed whenever it appears fair or just, the decision to permit withdrawal is “completely within the discretion of the trial court” except in cases of manifest injustice or substantial prejudice to the State).

“Manifest injustice” and “substantial prejudice” are necessarily imprecise standards, and an appellant seeking to overturn a trial court’s decision has faced a high hurdle under the current statute and its predecessors. Turner, 843 N.E.2d at 940. The trial court’s ruling on a motion to withdraw a guilty plea arrives in our appellate courts with a presumption in favor of the ruling. Id. at 940-41. One who appeals an adverse decision on a motion to withdraw must therefore prove by a preponderance of the evidence that the trial court abused its discretion. Id. at 941. We will not disturb the court’s ruling where it was based on conflicting evidence. Id.

Carter analogizes his case to Turner and claims withdrawal of his plea is necessary to correct a manifest injustice. In Turner, the defendant pleaded guilty to dealing cocaine but had not yet been sentenced when our Supreme Court issued its opinion in Litchfield v. State, 824 N.E.2d 356 (Ind. 2005). In Litchfield, 824 N.E.2d at 364, the court held that the State could not conduct random trash pulls, but must instead demonstrate trash pulls were supported by articulable, individualized suspicion. Because evidence against the defendant in Turner had been procured through a random trash pull, the defendant sought to withdraw his plea after Litchfield was decided. Turner, 843 N.E.2d at 941. In light of the new rule announced in Litchfield, our court determined that denying the defendant the opportunity to withdraw his plea and assert a previously unavailable constitutional right amounted to “manifest injustice,” and that the defendant’s motion to withdraw his plea should have been granted. Turner, 843 N.E.2d at 945.

In analogizing his case to Turner, Carter claims that the changed factual circumstances in his case are similar to the changed legal circumstances in Turner, and

that because he did not have the benefit of the changed testimony at the time of his plea, withdrawal of his plea is necessary to correct a manifest injustice.

The basis of Carter's motion to withdraw was the changed testimony of the State's key witness, the victim, Leeks, who had previously identified Carter as the shooter but who, subsequent to the plea, had signed an affidavit indicating he had changed his version of events and could no longer identify the shooter with certainty. In this affidavit, Leeks specifically stated that he was "uncertain" as to whether Carter had shot him. App. at 74. Carter's motion was also based upon the fact that he was "afraid of the consequences" of proceeding to trial facing a possible seventy-year sentence.⁴ App. at 73.

We are unconvinced that the changed factual circumstances in this case are comparable to the changed legal circumstances in Turner. In Turner, the defendant sought to withdraw his plea upon discovering that evidence to be used against him was arguably inadmissible as a new matter of constitutional law. Here, in contrast, Carter's motion to withdraw his plea was based in important part only upon a challenge to the substantive merits of the evidence to be used against him. In light of this distinction and the recognition that our substantive evaluation of evidence is largely deferential to the trial court, we are unpersuaded that the holding in Turner equally applies to the instant case.

⁴ We fail to see how Carter's claimed fear of the consequences of trial is more indicative of innocence, or for that matter, of guilt.

In considering Carter's claim, we recognize that Leeks's version of the events at issue changed after Carter entered into his plea. Under the facts of this case, however, we do not find withdrawal of the plea to be necessary to correct a manifest injustice. We first note that Leeks's story had apparently changed more than once, given defense counsel's argument that Leeks had initially reported his certainty that Carter was *not* the shooter, which was contrary to the contents of Leeks's affidavit. Moreover, on the merits, Leeks's changed story was not that Carter was definitely *not* the shooter; it was just that Leeks could not identify Carter with certainty as the shooter. Additionally, Leeks did state in his affidavit that he had been involved in a verbal altercation with Carter the day of the shooting, he saw Carter three to four minutes before the shooting, and he saw him drive away shortly after the shooting. Further, the timing and circumstances of the plea were such that Carter pleaded guilty on the second trial date after Leeks had shown up, which Leeks had not done on the first trial date, and it was the opinion of the trial court that Leeks's presence "had a significant amount to do with the plea."⁵ Tr. at 25. Further still, and most importantly, as the trial court found, Carter admitted to the shooting at the plea hearing after being fully advised of his rights. While we recognize, as Carter points out in his brief, that some defendants admit guilt when they are in fact not guilty, the trial court, which was in a better position to judge Carter's credibility, attributed great weight to his admission of guilt. We will not reweigh its

⁵ According to the court, there were also two other witnesses present at the second trial date, although they had apparently also been present at the first trial date.

assessment on that point. We conclude that Carter has not met his great burden to show this was an abuse of discretion.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.